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High Century Sdn Bhd v Liew Foot and Sons Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 12AC-4–10 OF 2013
MARY LIM J
14 FEBRUARY 2014

Civil Procedure — Summary judgment — Delay — Whether triable issues raised — Whether delay in filing and service of affidavit in reply to affidavit supporting summary judgment application fatal — Whether delay prejudiced opposing party or was curable under O 1A of the Rules of Court 2012 — Whether O 33 r 5 and O 34 r 1(3) relevant in application for summary judgment

The appellant had appointed the respondent as its subcontractor to carry out road-works in a housing project. Claiming that it had completed the works, the respondent sued the appellant in the sessions court for the amount unpaid under the subcontract and applied for summary judgment on its claim. The appellant failed to file an affidavit in reply to the respondent's affidavit in support of the summary judgment application within the 14-day time-frame stipulated under O 32 r 13(2) of the Rules of Court 2012 ('the ROC') and only did so a day before the hearing of the application. A copy of the affidavit in reply was served on the respondent only on the hearing date. Allowing the respondent's objection to the late filing and service of the affidavit in reply, the sessions court disregarded the document and entered summary judgment in the respondent's favour. In coming to its decision, the sessions court had relied upon O 34 r 1(3) and O 33 r 5 of the ROC. In its instant appeal against the decision, the appellant submitted that the sessions court had failed to properly consider the principles applicable in a summary judgment application.

Held, dismissing the appeal with costs of RM5,000 and affirming the decision of the sessions court:

(1) The defence and counterclaim, the affidavit in reply and the documents found in that affidavit sought to raise an issue that the respondent was not entitled to judgment as its work had not complied with the specifications in the contract. Whilst this appeared to be an 'issue', it was not one that merited trial. It was not enough for a defendant to raise an issue or any issue. It had to be an issue that was triable or which merited a trial for its determination (see paras 9, 19 & 21).

(2) The delay in the filing of the affidavit in reply was not objected to on the basis of prejudice caused but simply as a technical non-compliance with the provisions of O 32. The objection could not stand in the way of

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justice. The provisions of O 1A and of the ROC were to be 'handmaidens' and not 'mistresses'; the interests of justice should always be at the forefront and should prevail (see para 17).

(3) Neither the provisions of O 33 r 5 nor those of O 34 r 1(3) applied to the instant case. Order 33 r 5 (read with r 2) operated where the court was deciding on how best to get on with the trial of the case; whether the issue or question identified was to be tried preliminarily or at or after the trial of the case. By its very nature, the respondent's application was to dispense with trial and seek summary judgment in its favour. Order 34 r 1(3) also did not apply because it was unclear what directions were given by the court for the appellant to comply with. There was also no evidence the court had issued any 'unless' or peremptory order as the consequence of non-compliance (see paras 11–15).

[Bahasa Malaysia summary

Perayu telah melantik responden sebagai subkontraktornya untuk menjalankan kerja-kerja jalan raya dalam projek perumahan. Mendakwa ia telah selesai kerja-kerja, responden menyaman perayu di mahkamah sesyen untuk amaun yang tidak dibayar di bawah kontrak dan memohon untuk penghakiman terus atas dakwaannya. Perayu gagal untuk memfailkan afidavit jawapan kepada afidavit sokongan responden terhadap permohonan penghakiman terus dalam jangka masa 14 hari yang dinyatakan di bawah A 32 k 13(2) Kaedah-Kaedah Mahkamah 2012 ('KKM') dan hanya berbuat demikian sehari sebelum pendengaran permohonan tersebut. Salinan afidavit jawapan diserahkan kepada responden hanya pada tarikh pendengaran. Membenarkan bantahan responden kepada pemfailan lewat dan penyerahan afidavit jawapan, mahkamah sesyen tidak mengendahkan dokumen tersebut dan memasukkan penghakiman terus yang memihak kepada responden. Dalam mencapai kepada keputusannya, mahkamah sesyen telah bergantung ke atas A 34 k 1(3) dan A 33 k 5 KKM. Dalam rayuannya terhadap keputusan tersebut, perayu berhujah bahawa mahkamah sesyen telah gagal untuk mempertimbangkan secara betul prinsip yang diguna pakai dalam permohonan penghakiman terus.

Diputuskan, menolak rayuan dengan kos sebanyak RM5,000 dan mengesahkan keputusan mahkamah sesyen:

(1) Pembelaan dan tuntutan balas, afidavit jawapan dan dokumen yang didapati di dalam afidavit yang memohon untuk membangkitkan isu bahawa responden tidak berhak kepada penghakiman kerana kerjanya tidak mematuhi spesifikasi di dalam kontrak tersebut. Sementara dianggap sebagai isu, ia bukan sesuatu yang mewajarkan perbicaraan. Adalah mencukupi untuk defendan membangkitkan isu atau apa-apa isu. Ia sepatutnya isu yang boleh dibicarakan yang mewajarkan perbicaraan untuk penentuannya (lihat perenggan 9, 19 & 21).

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(2) Kelewatan memfailkan afidavit jawapan tidak dibantah atas dasar akibat prejudis tetapi semata-mata sebagai ketidakpatuhan teknikal dengan peruntukan A 32. Bantahan tidak dapat bertahan dalam keadilan. Peruntukan A 1A KKM adalah menjadi 'handmaidens' dan bukan 'mistresses'; kepentingan keadilan sepatutnya menjadi keutamaan dan patut mengatasi (lihat perenggan 17).

(3) Bukan peruntukan A 33 k 5 ataupun A 34 k 1(3) diguna pakai kepada kes ini. Aturan 33 k 5 (dibaca bersama k 2) beroperasi di mana mahkamah sedang memutuskan cara terbaik untuk meneruskan dengan perbicaraan kes tersebut; sama ada isu atau soalan yang dikenalpasti dibicarakan pada mulanya atau selepas perbicaraan kes tersebut. Dengan sifatnya sendiri, permohonan responden adalah untuk menjalankan perbicaraan dan memohon penghakiman terus dalam memihaknya. Aturan 34 k 1(3) juga tidak digunapakai kerana ia tidak jelas arahan apakah yang diberikan oleh mahkamah untuk perayu mematuhinya. Juga tidak terdapat keterangan mahkamah telah mengeluarkan apa-apa perintah 'unless' atau mesti mematuhi akibat ketidakpatuhan (lihat perenggan 11–15).]

Notes

For cases on delay, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 9050–9100.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Ellis Mechanical Services Ltd v Wates Construction Ltd [1978] 1 Lloyd's Rep 33, CA (refd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241, FC (refd)

Legislation referred to

Rules of Court 2012 O 1A, O 14, O 14 r 2, O 32, O 32 r 13(2), O 33 rr 2, 5, O 34 r 1(1), (3)

KH Lim (Lee & Lim) for the appellant.
N Ramesh (Ramesh & Co) for the respondent.

Mary Lim J:

[1] This is an appeal against the learned sessions court judge's decision in allowing the respondent's application to enter summary judgment against the appellant on 21 October 2013.

[2] These are the facts of the respondent's claim. The respondent was appointed by the appellant as its subcontractor in a project for the 'Construction and Completion of Roadworks within Lot Boundary for 44

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units apartment (RP 10) for Cadangan Perumahan di atas Lot PT 13431 Mukim Hulu Kelang, Daerah Gombak, Selangor Darul Ehsan for RM890,720.50'.

[3] The respondent claimed that it had completed the works including variation works to which a statement of final account was issued to the effect that the appellant was owing the respondent a sum of RM105,600.70. The appellant issued a cheque for that sum. However, when the respondent presented the cheque for payment, the appellant instructed its bank to stop payment on the cheque. The respondent then filed the present claim. It is not premised on a dishonoured cheque but for a debt due.

[4] After the statement of claim had been served on the appellant on 29 August 2013, the appellant filed its memorandum of appearance on 18 September 2013. Its defence and counterclaim was filed on 16 October 2013.

[5] Meanwhile, the respondent filed an application to enter summary judgment on 23 September 2013. Upon receipt of the application, the appellant's solicitors informed the respondent that the director in charge of the matter was away overseas and would only be returning on 1 October 2013. The solicitors requested for time to file cause papers, in particular the affidavit in reply. It also requested the solicitors of the respondent to mention on its behalf on 30 September 2013 when the case would be coming up for management.

[6] That was duly done. On that day, the court fixed the respondent's application for hearing on 21 October 2013. On 1 October 2013, a sealed copy of the respondent's application was served on the appellant. According to O 32 r 13(2) of the Rules of Court 2012 , the appellant was required to file any affidavit in reply within 14 days from the date of service of the application and the affidavit in support. The appellant did not. Instead, it filed its affidavit in reply a day before the hearing and served a copy of the affidavit in reply on the respondent only on the day of hearing. That affidavit was sworn on 18 October 2013.

[7] On the day of hearing, the respondent objected to the late filing and service of the affidavit in reply. After hearing submissions, the learned sessions court judge allowed the objection, disregarded the affidavit in reply and entered judgment summarily against the appellant.

[8] The law in this respect is in fact, trite. The first consideration in any application for summary judgment is to consider whether the applicant plaintiff has satisfied the preliminary requirements. Those requirements are that the defendant must have entered an appearance; the statement of claim must have been served on the defendant; and the affidavit in support of the

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application must comply with the requirements of O 14 r 2 in that it must state the deponent's belief that there is no defence to the claim. Once these requirements are met, the plaintiff will have established a prima facie case and the plaintiff will become entitled to judgment. It is then upon the defendant to shift the burden by satisfying the court on why judgment should not be entered.

[9] The defendant must raise or show that the issue raised is a triable issue or an issue which merits a trial for its determination. It is not enough for the defendant 'to raise an issue or any issue' (see Federal Court's decision in *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241). The defendant is not however, required to show that the triable issue is one which is bound to succeed. The defendant merely needs to show that the issue is one which is at least, arguable. The court's duty is to determine whether the issue raised is triable — see also *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400.

[10] There is no indication as to whether the court had addressed its mind to these tests when allowing the respondent's application for summary judgment. What is instead immediately apparent from the grounds of decision is that the learned sessions court judge had relied on O 34 r 1(3) and O 33 r 5 in reaching its decision. With respect, the court disagrees.

[11] Order 33 r 5 provides:

> If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[12] Rule 5 must be read with r 2 and once that is done, it will become clear that this provision of the Rules of Court is not engaged. This provision operates where the court is deciding on how best to get on with the trial of the case, whether the issue or question identified is to be tried preliminarily, at or after the trial or completion of the trial of the whole case. At this point, the court is considering and giving directions on the trial of the case.

[13] The respondent is not inviting the court to proceed to trial. By its very nature, the respondent is urging the court to dispense with a trial and summarily decide the case in its favour. Order 33 r 5 is therefore not engaged.

[14] The learned sessions court judge also relied on O 34 r 1(3). This provision reads:

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> Where any party fails to comply with any order made or direction given by the Court under paragraph (1), the Court may dismiss the action, strike out any defence or counterclaim or make such other order as it thinks fit.

[15] Rule 1(3) has to be read together with sub-r (1). It would appear that the summary judgment was entered because the appellant failed to comply with directions given by the court under sub-r (1). However, it is not immediately apparent what those directions were. More important, for the power to be available under sub-r (3), it must be clear that at the time of the directions, that is on 30 September 2013, the court had directed on the consequences of non-compliance; or what is more commonly referred to as the 'unless orders' or preemptory orders. There is no evidence to that effect. That being so, that provision is not engaged at all.

[16] With respect, I do not believe the deployment of words to the effect that the learned sessions court judge had looked at all the cause papers and affidavits as stated in his grounds of decision is sufficient to indicate that the court had indeed addressed its mind to the applicable principles under O 14. On the contrary, the paragraphs of the decision that have just been discussed reveal that he had in fact not done precisely that.

[17] In my view, the delay in the filing of the affidavit in reply was not objected to on the basis of prejudice. It was a simple case of non-compliance with the provisions of O 32. While I do not condone tardy work, I am mindful of the provisions of O 1A of the Rules of Court 2012 and that the Rules of Court 2012 are to be 'handmaidens' and not 'mistresses'; that the interests of justice must always be in the forefront and prevail. The respondent's objection on non-compliance of the time period for filing of the affidavit is an objection on a technical non-compliance of the rules which cannot stand in the way of justice and its interests. In any case, the respondent never claimed to be prejudiced by such non-compliance.

[18] Be that as it may, this is an appeal and as a rehearing of the application, and in the interests of justice, the court will look at the affidavit in reply. That affidavit invites the court to look at the issues raised in the defence and counterclaim.

[19] In essence, the defence is that the plaintiff is not entitled to the sum claimed because it did not render work according the contract terms. The appellant claimed that the respondent did not supply sand and crusher run to the depth or thickness as required under the terms of the underlying contract between them. The appellant then appointed Constec Sdn Bhd to carry out tests on the respondent's work. It claimed that from the report prepared by

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Constec, it was clear that the respondent's work was not according to the specifications in the contract. A

[20] The appellant claimed that Constec's report was brought to the respondent's attention. On its part, it then carried out rectification works to the tune of RM25,161.62. Bills and invoices to support this were marked as exh P3. B

[21] Upon careful perusal of the issue, the contents of the defence and counterclaim, the affidavit in reply and the documents found in the affidavit in reply, I must say that the purported issue or issue identified by the appellant, which is whether the respondent's work was according to specifications, while it may appear to be an issue, I do not find the issue, if at all it may be labeled as an 'issue', to be one that merits trial. C

D

[22] First of all, the appellant claims to have come to learn of the respondent's defective work only after the statement of final account had been issued on 15 March 2013. I find that highly unlikely given that the appellant's own affidavit avers that upon receipt of Constec's report and upon learning of the respondent's work from that report, the appellant had brought that matter to the respondent's attention. Since Constec's report was issued on 27 July 2012, the appellant's claim to knowledge after issuance of the statement of final account on 15 March 2013 simply cannot stand. E

[23] Further, the appellant claimed that it had carried out rectification works as a result of the respondent's defective works. It thereby incurred a sum of RM25,161.62. This claim flies in the face of the very documents or invoices which the appellant has attached to its affidavit and which it is relying on to support such a claim. The invoices found in exh P3 were all incurred around June or July of 2011. This was long before the matter of Constec or Constec's report even arose! F G

[24] Further, if these were indeed the sums claimed, I cannot see how they were not claimed or particularised in the defence and counterclaim. Instead, para 7.1 pleads that details will be offered at trial and a sum of RM672,000 representing the imposition of LAD at RM1,500 per day for 448 days was claimed. H

[25] Even on the issue of LAD, I agree with the respondent that this is a not an issue which merits trial as it is patently clear from the terms of the contract that it is imposed for non-completion of work. The appellant's own document certifies that work was completed on 19 December 2008 with the date of commencement on 20 September 2008 — see the certificate of payment No 2 (Final) at p 58 of the record of appeal. If interim certificates are considered as I

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'undisputedly due' debts as was pronounced in *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33, what more statements of final accounts prepared by the appellant themselves. The court cannot ignore such evidence and pleadings presented. That being so, I cannot see how this is even an issue, let alone an issue which is arguable and meriting trial. The principles and tests set in *Bank Negara Malaysia v Mohd Ismail & Ors* have not been met in this case.

[26] For the reasons I have set out, the appeal is accordingly dismissed with RM5,000 costs. The decision of the learned sessions court judge is affirmed but for different reasons.

Appeal dismissed with costs of RM5,000 and decision of the sessions court affirmed.

Reported by Ashok Kumar